

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

KEVIN WILTSE and
KEVIN WILTSE LOGGING,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

FPAB NO. 04-015

ORDER GRANTING
SUMMARY JUDGMENT

This case concerns Notice of Intent to Disapprove (NOID) No. 03-V-THV issued on December 10, 2004 to Kevin Wiltse and Kevin Wiltse Logging for failure to pay the civil penalty imposed by Order No. 03-V-THF, issued on August 8, 2003 to Kevin Wiltse Logging. Wiltse had appealed Notice of Penalty No. 03-V-THF to the Forest Practices Appeals Board in Case No. FPAB No. 03-014, but he voluntarily withdrew his 2003 appeal and the Board signed an Order of Dismissal on January 29, 2004. Appellant Wiltse challenges the Washington Department of Natural Resources' (DNR) December 27, 2004 issuance of NOID No. 03-V-THF to Kevin Wiltse and Kevin Wiltse Logging for failure to pay Civil Penalty No. 03-V-THF for seven calendar days, or until the penalty was paid. Respondent DNR has moved for dismissal of Wiltse's appeal of the NOID, asserting that there are no facts in dispute and there is no legal

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1 basis to sustain the appeal. Appellant Wiltse concedes that he has not paid most of Penalty No.
2 03-V-THF, but he challenges the penalty itself, claiming that it was too high.

3 The Board deliberating on the motion was comprised of Tom P. May, Chair, John Giese,
4 Member, and Joel Rupley, Member. Administrative Appeals Judge, Cassandra Noble, presided
5 for the Board. In ruling on the motion, the Board considered the arguments of counsel for DNR
6 and the Appellant and the entire file, including particularly the following material:

- 7 1. Respondent DNR's Motion for Summary Judgment and Memorandum in Support
(received June 20, 2005);
- 8 2. Declaration of Jill Jones, with exhibits (received June 20, 2005);
- 9 3. Appellant's Response to Respondent's Motion for Summary Judgment (received July 22,
2005);
- 10 4. Respondent DNR's Reply Brief in Support of its Motion for Summary Judgment (May
22, 2005); and
- 11 5. Respondent DNR's Supplemental Reply Brief in Support of its Motion for Summary
Judgment (received August 1, 2005).

12 **BACKGROUND FACTS**

13 On June 5, 2003, DNR issued Stop Work Order No. 06803 and on June 5, 2003, Stop
14 Work Order No. 06804 to Kevin Wiltse, who did not appeal either order. On August 8, 2003,
15 DNR issued Civil Penalty No. 03-V-THF to Kevin Wiltse in the amount of \$17,500 for
16 violations of RCW 76.09.050 (operating without an approved forest practices application or
17 notification, operating ground-based equipment in Type F waters, and yarding in and across
18 Type F waters with ground-based equipment), RCW 76.09.130 (failure to obey a stop work
19 order), WAC 222-20-010 (operating without an approved forest practices application or
20 notification), WAC 222-46-040(5) (failure to obey a stop work order), and WAC 222-30-

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070(1)(a), (2)(a) (operating ground based equipment in Type F waters; yarding in and across Type F waters with ground-based equipment). Declaration of Jill Jones, page 2.

Appellant Wiltse appealed Notice of Penalty No. 03-V-THF to the Forest Practices Appeals Board, which entered an Order of Dismissal on January 29, 2004 following Mr. Wiltse's voluntary withdrawal of his appeal. On October 4, 2004, DNR sent Appellant Wiltse a final notice of payment due requesting a written plan for timely payments or the total amount due of \$17,500. Since October of 2004, DNR has received the following payments from Appellant Wiltse: \$50.00 (November 19, 2004), \$75.00 (March 17, 2005), \$75.00 (April 18, 2005), and \$75.00 (May 23, 2005). As of June 2005, Wiltse's total remaining civil penalty was \$17,225 plus interest. Declaration of Jill Jones, page 3. In oral argument on August 12, 2005, Appellant Wiltse stated that he, in fact, has not paid the remaining \$17,225 plus interest. In his summary judgment motion reply, Wiltse objected to the amount of the original fine that was the subject of FPAB No. 04-015. Appellant's Response to Respondent's Motion for Summary Judgment.

On December 10, 2004, DNR issued Notice of Intent to Disapprove (NOID) No. 03-V-THF to Kevin Wiltse and Kevin Wiltse Logging for failure to pay Civil Penalty No. 03-V-THF for seven calendar days or until the penalty was paid. Declaration of Jill Jones, Attachment 1-C. The NOID prevented Appellant Wiltse from conducting or participating to any degree in any forest practices, effective beginning 30 days from receipt of the Notice and remained in effect for seven days or until compliance with the Failure to Pay Civil Penalty Order No. 03-V-THF was achieved. This appeal followed.

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1 **ISSUE**

2 The legal issue in this case, as articulated in the Pre-Hearing Order is as follows:

3 Was Notice of Intent to Disapprove (NOID) No. 03-V-THF properly issued for
4 failure to pay the \$17,500 dollar Civil Penalty assessed in August 2003, a penalty,
which is now a final order of DNR?

5 **ANALYSIS**

6 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
7 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
8 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
9 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
10 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
11 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
12 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004
13 (1991).

14 The party moving for summary judgment must show there are no genuine issues of
15 material fact and that the moving party is entitled to judgment as a matter of law. *Magula v.*
16 *Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
17 summary judgment proceeding is one that will affect the outcome under the governing law.
18 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
19 and reasonable inferences must be construed in favor of the nonmoving party as they have been
20 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

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1 The issue before the Board in this motion is whether challenged NOID No. 03-V-THF
2 issued by DNR should be upheld as proper where the Appellant concedes that he did not pay
3 most of civil penalty. The facts underlying DNR's Motion for Summary Judgment are not in
4 dispute. Appellant Wiltse agrees that he has not paid the fine, although he objects to the original
5 fine amount as "way out of line." Response of Wiltse, July 22, 2005. Appellant Wiltse also
6 states that, at the time the original fine was assessed, he was employed by a private landowner
7 and he basically argues that he should not be responsible for the activities that caused the fine to
8 be assessed, and that he had not previously been the subject of DNR enforcement activities.
9 However, these are matters that were at issue only in the original challenge to the penalty in
10 FPAB No. 03-014. This Board no longer has jurisdiction over the fine amount as the appeal of
11 the original fine was dismissed on January 29, 2004. Therefore the fine amount cannot serve as
12 a basis for this appeal.

13 The only issue properly before this Board in this case is whether DNR properly issued the
14 NOID for failure to pay Civil Penalty No. 03-V-THF. Other than challenging the amount of the
15 fine, appellant Wiltse makes no factual or legal argument directed at issuance of the NOID,
16 although he does argue that the NOID will have an economic effect on him. In the absence of
17 any controverting declarations, the facts as contained in the DNR declaration and associated
18 materials are essentially unchallenged. The Appellant having conceded that he has not paid the
19 assessed fine, there are no genuine issues of material fact on the record before the Board.

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1 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
2 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
3 opposing party. *Jacobson*, 89 Wn.2d at 108, 569 P.2d 1152. If the party moving for summary
4 judgment shows that there are no genuine issues of material fact, the moving party is entitled to
5 judgment as a matter of law. *Magjula*, 131 Wn.2d at 182; 930 P.2d 307. If the undisputed facts
6 show that DNR is entitled to judgment as a matter of law, an order of summary judgment is
7 appropriate.

8 When a forest practices penalty is imposed and an appeal of that penalty has been filed,
9 the penalty becomes due and payable upon completion of the administrative and judicial review,
10 if any. RCW 76.09.170(5). The prior appeal was dismissed long ago and the single issue in this
11 case is whether NOID No. 03-V-THF was properly issued for failure to pay the full \$17,500
12 dollar penalty. The civil penalty DNR assessed in August 2003 is now a final DNR order. The
13 legislature has provided the DNR with enforcement powers to enforce its final orders:

14 The department of natural resources may take any necessary action to enforce any
15 final order or final decision, and may disapprove any forest practices application
16 or notification submitted by any person who has failed to comply with a final
17 order or final decision or has failed to pay any civil penalties as provided in RCW
18 76.09.170, for up to one year from the issuance of a notice of intent to disapprove
19 notifications and applications under this section or until the violator pays all
20 outstanding civil penalties and complies with all validly issued and outstanding
21 notices to comply and stop work orders, whichever is longer...

RCW 76.09.140(1)

Appellant Wiltse's penalty became due and payable upon completion of the prior
administrative review process. RCW 76.09.170(5). He concedes that he has not paid the

1 penalty. Thus there are no genuine issues of material fact in this case regarding either the
2 penalty or the amount due and owing. DNR has the statutory option of issuing a NOID upon
3 such failure to pay outstanding civil penalties, and properly issued NOID 03-V-THF to Appellant
4 Wiltse.

5 Based on the foregoing analysis of the facts and the issue, the Board enters the following

6 **ORDER**

7 In accordance with the analysis above, summary judgment is granted in favor of
8 Respondent Department of Natural Resources. The case is, therefore, dismissed with prejudice.

9 DONE this 1st day of September 2005.

10 **FOREST PRACTICES APPEALS BOARD**

11 Tom P. May, Chair

12 John Giese, Member

13 Joel Rupley, Member

14 Cassandra Noble
15 Administrative Appeals Judge, Presiding